FILE COPY

Office - Supreme Court, U. S.

JUN 8 1948

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. [redacted] 80

INTERNATIONAL BROTHERHOOD OF TEAMSTERS and CHAUFFEURS, LOCAL UNION NUMBER 179, AMERICAN FEDERATION OF LABOR, Joliet, Will County, Illinois, and VIRGIL FLOYD, Secretary-Treasurer of said Local Union No. 179,

Petitioners,

vs.

LEO JOHN DINOFFRIA, FRANCES DINOFFRIA, JOHN CLEMENTI and MARY CLEMENTI,

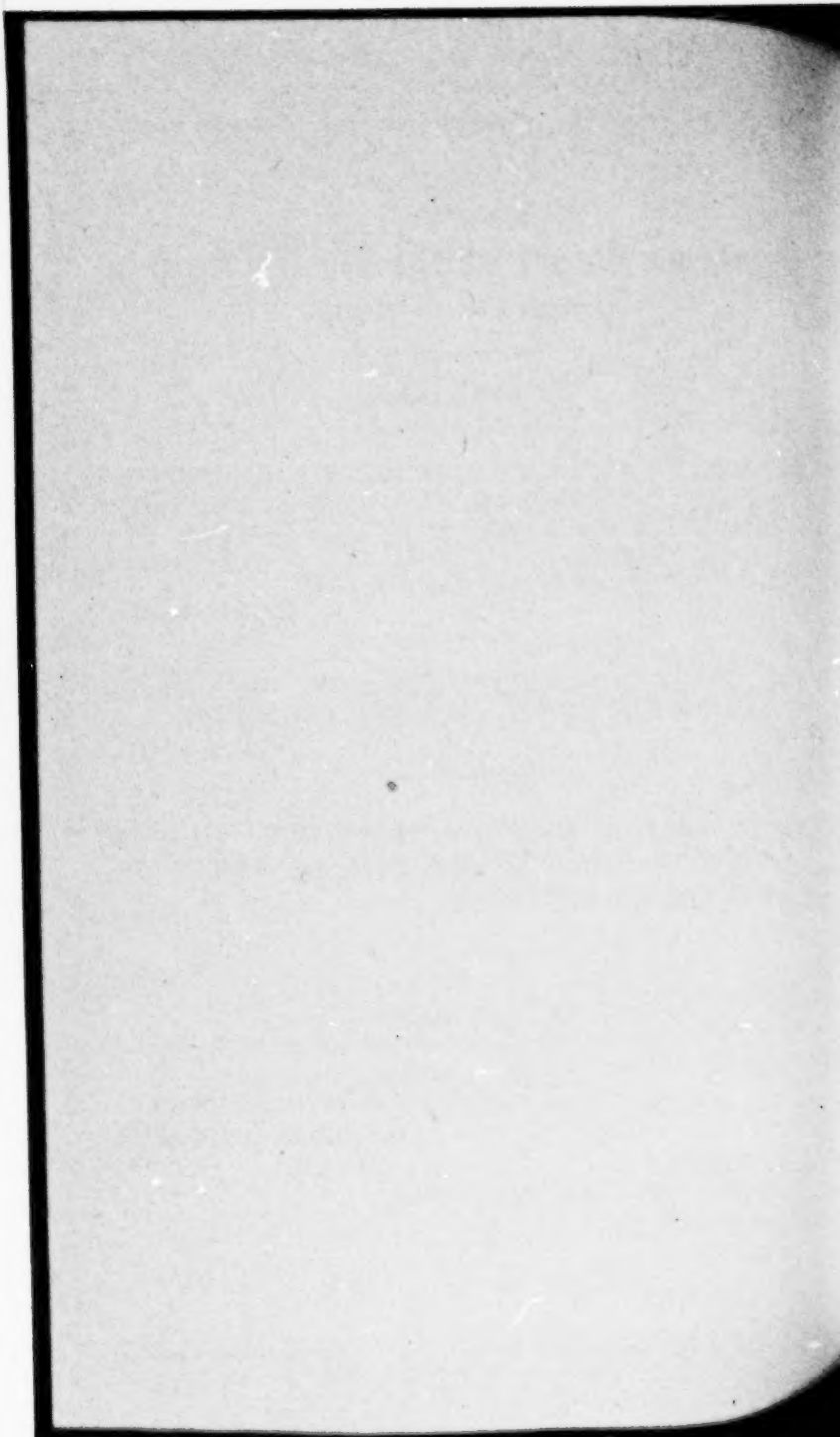
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT OF PETITION.

DANIEL D. CARMELL,
130 North Wells Street, Chicago, Illinois,
WALTER F. DODD,
30 North La Salle Street, Chicago, Illinois,
Attorneys for Petitioners.

FRED HERZOG,
130 North Wells Street, Chicago, Illinois,
FRANCIS A. DUNN,
Joliet, Illinois,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 268



SUBJECT INDEX.

PAGE

PETITION.

Statement of the matter involved..... 1

This Court has jurisdiction..... 4

The questions presented..... 5

Reasons relied upon for allowance of writ..... 6

BRIEF.

The opinions below..... 7

Jurisdiction 7

Statement of the case..... 8

Errors relied upon..... 12

Argument 13

I. The Illinois Appellate Court decided a federal constitutional question without having jurisdiction 13

II. The Illinois Supreme Court by its refusal to recognize the fact that the Appellate Court decided a constitutional issue, deprived the petitioners of due process of law..... 15

III. The union is protected by the constitutional right of freedom of speech in its effort to organize respondents 19

Conclusion 23

TABLE OF CASES AND AUTHORITIES.

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184..... 20

Bakery & P. Drivers & Helpers, I. B. T. v. Wohl, 315 U. S. 769.....3, 20

Cafeteria Employees Union v. Angelos, 320 U. S. 293..3, 20

Kowalczyk v. Swift & Co., 317 Ill. 312..... 18

Lawrence v. State Tax Commission, 286 U. S. 276..... 19

Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., 311 U. S. 91..... 22

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 287..... 17

N. L. R. B. v. Hearst Publications, 322 U. S. 111..... 22

Parker v. People of State of Illinois, 68 S. Ct. 708....2, 18

People v. Richardson, 397 Ill. 84..... 18

Senn v. Tile Layers Protective Union, 301 U. S. 468...3, 20

OTHER AUTHORITY.

McCaskill, Illinois Civil Practice Act, Annotated.... 18

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS and CHAUFFEURS, LOCAL UNION NUMBER 179, AMERICAN FEDERATION OF LABOR, Joliet, Will County, Illinois, and VIRGIL FLOYD, Secretary-Treasurer of said Local Union No. 179,

Petitioners,

vs.

LEO JOHN DINOFFRIA, FRANCES DINOFFRIA, JOHN CLEMENTI and MARY CLEMENTI,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners, International Brotherhood of Teamsters and Chauffeurs, Local Union Number 179, A. F. of L., Joliet, Will County, Illinois, and Virgil Floyd, Secretary-Treasurer of said Local Union No. 179, respectfully petition this Honorable Court for a writ of certiorari to the Illinois Supreme Court.

Statement of the Matters Involved.

The Union, one of petitioners herein, which is composed of teamsters and service station employees, sought to persuade the respondents to become members of the Union.

The respondents, Dinoffria and Clementi were competitors and self-employers in the sense of doing their own work in the operation of service stations, Dinoffria being actually an employee of the Standard Oil Company from which he leased his service station, and Clementi being substantially an employee of the Texas Company.

The respondents refused to become members of the Union and the teamsters who were members of the Union ceased to deliver gasoline to them. Respondents thereupon sought an injunction from the Circuit Court of Will County, by a complaint in which they charged coercion and violence. On hearing, the trial court found that there was no intimidation or violence, and that, under decisions of this Court, the Union and its members were protected by the guarantee of freedom of speech given by the Federal Constitution. The full text of the trial court's opinion is found on pages 21-27, and its decree on page 28 of the Transcript.

The respondents, who were plaintiffs below, thereupon appealed to the Appellate Court. The Appellate Court not having jurisdiction upon constitutional issues, Dinoffria and Clementi by such appeal automatically waived constitutional issues, as this Court is well informed by the recent case of *Parker* v. *People of the State of Illinois,* 68 S. Ct. 708, 92 L. ed. 685 (April 5, 1948).

Although without jurisdiction to pass upon a constitutional issue, the Appellate Court gives no attention to the facts which may have determined that respondents were employees, but bases its opinion primarily upon the contention that freedom of speech of a union and its members as guaranteed by the First and Fourteenth Amendments does not apply to their relations with self-employers. The Appellate Court said:

"In no case, however, has the Court sanctioned or

been called upon to approve peaceful picketing or boycotting or other conduct of a labor union where it has been directed against a self-employer who has no employees, as in the instant case."

This Court does not agree with that statement. *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468; 57 S. Ct. 857; *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769; 62 S. Ct. 816; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293; 64 S. Ct. 126.

The opinion of the Appellate Court appears at pages 45-55 of the transcript, and must be read in full in order to determine whether it is based in whole or in part upon a federal constitutional issue.

Immediately upon their becoming informed of the opinion of the Appellate Court, the petitioners here, who were defendants below, moved for a rehearing, which was denied. This was followed by a motion to transfer the case to the State Supreme Court. A transfer was denied, and on writ of error to the Supreme Court of Illinois, the writ of error was dismissed on the ground that no determination of a constitutional issue was involved in the Appellate Court's opinion. The Supreme Court of Illinois recognizes that writ of error was a matter of right if the Appellate Court had passed upon a constitutional issue. The opinion of the Supreme Court of Illinois appears in full in the transcript (pp. 58-63), and must be read in full in order to determine whether its conclusion is correct. The petitioners present the following as an outline of what they claim to have occurred:

(1) The plaintiffs (respondents here) brought suit in the state's trial court—the Circuit Court.

(2) The trial court had jurisdiction and decided against them on issues of law and of fact.

(3) The plaintiffs appealed to the Appellate Court—a court having no jurisdiction over constitutional issues, and by such appeal waived the constitutional issues.

(4) The Appellate Court decided the case adversely to defendants—upon state and federal constitutional issues.

(5) The defendants made and the Supreme Court of Illinois denied a motion to transfer the case to the Supreme Court of Illinois, the Court having jurisdiction over constitutional issues (Trans. 55-56).

(6) The defendants then sought a writ of error from the Appellate Court to the Supreme Court of Illinois—the procedure for the presentation of such issues.

(7) The Supreme Court of Illinois recognizes its duty to pass upon such issues, but has dismissed the writ of error on the ground that the Appellate Court did not determine constitutional issues in its opinion.

(8) The question is one to be determined on the face of Appellate and Supreme Court opinions. If the Appellate Court's opinion finds basis on federal constitutional issues, a state court without jurisdiction is made the body for final construction of the constitution of the United States.

This Court Has Jurisdiction.

Jurisdiction of this Court is invoked under Title 28, Section 344(b) of the United States Code.

There are special and important reasons for the granting of review on writ of certiorari. (Supreme Court Rule 38, par. 5).

Rehearing was denied in this case by the Supreme Court of Illinois on March 11, 1948.

The jurisdiction over the matter at issue is clear and undeniable if the Appellate Court of Illinois passed upon

federal constitutional issues. The Supreme Court of Illinois has made the determinations of the Appellate Court final and not subject to review.

If this Court determines that it has jurisdiction, it clearly has authority to determine the status of respondents, and to determine whether organizations of employees may deal with them by peaceful speech.

The Questions Presented.

This case presents questions of jurisdiction and issues of law. Three issues are presented to this Court:

(1) May the Illinois Supreme Court, in violation of the Fourteenth Amendment to the U. S. Constitution, deprive residents of the State of Illinois of their right to have constitutional issues determined by the Illinois Supreme Court? May it refuse to hear and to decide constitutional matters, thereby making final and upholding a decision on constitutional questions by the Illinois Appellate Court, which decision was rendered by that Court in violation of its jurisdiction.

(2) Are oral communications of unions and union members, made without threats of violence or intimidation in the course of peaceful organizing activities, protected by the right of freedom of speech, regardless of whether they are directed against employees or self-employers, or is that protection forfeited because those communications are addressed to or affect self-employers?

(3) Are small filling station operators who are under economic dependence and control of the gasoline supply companies, self-employers or do they not rather possess, in legal contemplation, the status of company employees?

Reasons Relied Upon for Allowance of Writ.

(1) The Illinois Supreme Court erred in refusing to grant petitioners' motion of transfer and writ of error since it thereby deprived the petitioners of due process of law in violation of the Fourteenth Amendment to the U. S. Constitution, thus denying petitioners an opportunity to be heard on the constitutional question of freedom of speech which was decided by the Illinois Appellate Court without having jurisdiction to do so.

(2) The Illinois Appellate Court erred in deciding that the right of freedom of speech as guaranteed by the Fourteenth Amendment to the U. S. Constitution does not protect oral communications of unions or union members which do not contain any threats of violence or intimidation, simply because they are addressed to or are directed against or might affect self-employers.

(3) Small filling station operators such as are involved in the present case, may not be regarded as self-employers but must be considered as having the status of employees.

Respectfully submitted,

DANIEL D. CARMELL,
WALTER F. DODD,
Attorneys for Petitioners.

FRANCIS A. DUNN,
FRED HERZOG,
Of Counsel.

SUPREME COURT of the UNITED STATES

No.

OCTOBER TERM, A. D. 1947.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS and CHAUFFEURS, LOCAL UNION NUMBER 179, AMERICAN FEDERATION OF LABOR, Joliet, Will County, Illinois, and VIRGIL FLOYD, Secretary-Treasurer of said Local Union No. 179,

Petitioners,

vs.

LEO JOHN DINOFFRIA, FRANCES DINOFFRIA, JOHN CLEMENTI and MARY CLEMENTI,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the Illinois Appellate Court is reported in 331 Ill. App. 129, 72 N. E. 2d 635; the opinion of the Illinois Supreme Court in 399 Ill. 304, 77 N. E. 2d 661. The opinions are also printed in full in the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 344 (b) of the Judicial Code.

The Illinois Appellate Court for the Second District decided the constitutional question of freedom of speech in its relation to the organization of self-employers by unions, (a) without having jurisdiction to do so, and (b) in contravention of established principles. The Illinois Supreme Court refused to hear the case by denying a transfer motion and a petition for writ of error, thus vesting the final authority to determine a federal constitutional question in

a court which had no jurisdiction. It thereby deprived the petitioners of due process of law.

The opinion by which the Illinois Supreme Court refused to grant the writ of error was rendered on January 22, 1948, and the petition for rehearing was denied on March 11, 1948.

Statement of the Case.

The facts involved in this case are simple.

Respondents Leo John Dinoffria and Frances Dinoffria and John Clementi and Mary Clementi were gasoline station operators in Joliet, Illinois. They operated their stations alone without the help of any employees.

The premises on which the Dinoffrias (husband and wife) conducted their business and the equipment with which they conducted their business were leased from the Standard Oil Company. Up to the time of the incident which gave rise to the present procedure, they also purchased all gasoline and petroleum products from the Standard Oil Company. The gasoline purchased from the company was delivered to them in tank cars of the company, driven by a company employee by the name of James E. Poole who was a member of Local 179 of the Chauffeurs and Teamsters Union (Rec. 30, 34.)

Local 179 counted among its members many filling station employees and many so-called independent filling station operators. (See the trial court's opinion, Rec. 22, in which the court emphasized that many filling station operators of the City of Joliet were members of the union). In order to protect the working conditions of these members, Local 179 engaged in an organizing campaign, to get as many filling station employees and small gas station operators as possible into the union. The gas station operators were, upon joining the union, requested to sign an agreement in which they promised to conform to certain closing hours and to other working conditions and to eliminate the

harmful practice of sales premiums. (See Plaintiffs' [Respondents] Exhibit No. 7, Rec. 39, 40, 44, which is the union's form of agreement with filling station operators.)

On January 25, 1946, a man came to the Dinoffria station and solicited Mrs. Dinoffria to have her husband join the union. When she said: "What for? We don't have to belong", the man replied: "Oh yes, you do," and left the premises (Rec. 32-33). Thereafter, Ellery Floyd, business agent of the union—and not Virgil Floyd, as alleged in the complaint, advised one of the union drivers of the Standard Oil Company to request Poole not to make any more deliveries to the Dinoffrias since the union had difficulties with them (Rec. 35).

On the same day (January 25) on which Mrs. Dinoffria was solicited to join the union, the Dinoffrias placed an order for gasoline with the Standard Oil Company; however, the driver, Poole, who saw the order in the call book in which all orders to be filled were entered by a company clerk, did not make the delivery, and the company neither requested him to do so nor took any other action whatsoever. No other order was then placed by the Dinoffrias (Rec. 31).

As to the respondents John and Mary Clementi (husband and wife) the evidence was submitted to the court in the form of a stipulation. According to that stipulation, John and Mary Clementi operated a gas station, without any employees, on their own premises in Joliet. They sold at their station products of the Texas Company with which they had a valid sales agreement (Rec. 38-39).

On or about January 25, 1946, John Clementi was approached by members of Local 179 of the Teamsters and Chauffeurs Union and solicited for membership in the union. He refused to join the union and when he afterwards placed new orders with the Texas Company they were not filled. Lloyd Gibbs who was the driver of the Texas Com-

pany and a member of Local 179 was informed by the union that a dispute existed by virtue of the fact that John Clementi refused to join the Union (Rec. 38-39).

The respondents filed originally a suit for temporary and permanent injunctions and for damages against Local No. 179 of the International Brotherhood of Teamsters and Chauffeurs, its secretary-treasurer Virgil Floyd, and against the Standard Oil Company (Indiana) and the Texas Company. Later the two companies were dismissed from the action (Rec. 14), and an amended complaint was filed which was directed only against the union and its secretary-treasurer (Rec. 6-13).

The motion for the temporary injunction to restrain the union and its agents from interfering with the deliveries of gasoline and petroleum products to the respondents' stations was heard and denied and the cause was set for hearing on the merits (Rec. 14).

At the conclusion of the hearing on the merits, the court filed an opinion (Rec. 21), and entered a decree finding the issues for the petitioners and against the respondents and dismissed the amended complaint for want of equity (Rec. 28). The respondents appealed that decision to the Appellate Court.

In their application to the Circuit Court for an injunction, respondents in their amended complaint, relied upon eight grounds designated as paragraphs (a), (b), (c), (d), (e), (f), (g), and (h), with paragraphs (b) to (g) seeking relief from alleged picketing, assaults, violence, conspiracy and boycotting (Rec. 9, 13). All of these paragraphs were considered in the opinion of the Circuit Court (Rec. 21, 22), but paragraphs (b) to (g) were omitted from the abstract submitted to the Appellate Court on appeal to that Court by respondents; and their notice of appeal asked for a

reversal of the decree of the Circuit Court, with instructions to:

> "1. Enter a judgment in favor of the plaintiffs and against the defendants for damages caused by the wrongful stoppage of deliveries of gasoline and petroleum products to the plaintiffs.
>
> "2. Enter a decree in favor of the plaintiffs and against the defendants enjoining the defendants from interfering with the deliveries of gasoline and petroleum products to plaintiffs' places of business" (Rec. 29).

The Appellate Court reversed the decree of the trial court and remanded the cause to the trial court with direction to enter a decree and to proceed in accordance with the views expressed in the opinion of the Appellate Court (Rec. 40).

The petitioners, thereupon, filed a petition for rehearing, and later also a motion for transfer of the case to the Supreme Court, both of which were denied by the Appellate Court (Rec. 40).

Afterwards the petitioners filed a motion to transfer which was denied by the Supreme Court of Illinois. (Rec. 55, 56) A writ-of-error was then sought from the Illinois Supreme Court, and was denied on the ground that the Appellate Court did not decide a constitutional issue but founded its opinion upon facts.

The petitioners take the position that the Appellate Court, in reversing the trial court's judgment, based its decision upon a determination of the constitutional question of freedom of speech in its relation to the organization of self-employers by unions; that the Appellate Court lacked jurisdiction to make such a determination; and that the Illinois Supreme Court, in refusing to hear the case upon petitioners' motion for transfer, or application for

writ of error deprived the petitioners of any opportunity to present their position as to constitutional issues before a court of competent jurisdiction. They, further, take the position that the Appellate Court without jurisdiction decided the constitutional question erroneously, since this Court as the final arbiter in all questions of the federal Constitution had repeatedly declared that the organization of self-employers was a lawful labor objective.

Errors Relied Upon.

The Illinois Appellate Court erred in determining the constitutional issue of free speech in its relation to the organization of self-employers by unions, since it had no jurisdiction to decide that question, and since it determined that issue in contravention of the repeated pronouncements of this Court to the effect that the organization of self-employers was a lawful labor objective.

The Illinois Supreme Court erred in denying writ of error on the ground that the Appellate Court had founded its judgment upon facts which did not involve a constitutional issue.

ARGUMENT.

I.

The Illinois Appellate Court decided a federal Constitutional question without having jurisdiction.

The Illinois Circuit Court (trial court) found the issues in favor of the petitioners. The respondents appealed the case to the Illinois Appellate Court which reversed the lower court's decision and rendered an opinion which it founded upon a determination that the constitutional right of free speech as interpreted by this Court did not apply to organizing activities of unions and union members with respect to self-employers who hired no employees. Two oral communications made by members of the petitioning union were considered unlawful by the Illinois Appellate Court and formed the basis of that Court's decision that the petitioning union engaged in unlawful conduct: (a) the solicitation of respondent, Frances Dinoffria, for membership in the union; and (b) the request directed by union agents to union members to discontinue the delivery of gasoline to the respondents. These oral communications, which by their very nature involved the question of freedom of speech, were considered by the Appellate Court upon that basis.

The Appellate Court was fully aware that in determining the lawfulness or unlawfulness of oral communications, it necessarily had to consider the constitutional issue of freedom of speech. It expressly referred in its opinion to the guarantee of freedom of speech and pointed out that picketing as the working man's means of communication was upheld by the United States Supreme Court in divers

situations, including cases where no employer-employee relationship existed. It pointed to the Swing, Meadowmoor and Thornhill cases, and then said:

> "In no case, however, has the court sanctioned, or been called upon to approve peaceful picketing or boycotting or *other conduct* of a labor union where it has been directed against a self-employer who hires no employees, as in the instant case." (Emphasis supplied.)

The clear meaning of these words was that although the United States Supreme Court had protected labor conduct in various situations in the past, under the right of freedom of speech, it had never done so—in the opinion of the Appellate Court—if that conduct was directed against a self-employer.

In other words, the Appellate Court stated that the right of freedom of speech could not protect the conduct of the union in any case, including the present, in which the organizational activities of the union were directed against self-employers, and not against employees. The Appellate Court, therefore, did not decide the case—as the Illinois Supreme Court concluded—upon the factual basis, but upon the reasoning that, under no aspect or privilege or right whatsoever, especially and including the right of freedom of speech as guaranteed by the U. S. Constitution, could the communications of the union agents be deemed lawful since they were directed against self-employers.

It was not the means employed by the union—as the Illinois Supreme Court stated—which were decisive for the Appellate Court's declaration that the union's conduct was unlawful, but the aim—organization of self-employers; and it did not make any difference, in the Appellate Court's reasoning, whether the means used to reach that aim were perfectly peaceful and consisted in oral communications

free from threats of violence or intimidation, or whether they were coercive and violent. The evil making the union's conduct unlawful was in the Appellate Court's opinion the organization of *self-employers,* and not the fact that this aim was not reached by peaceful picketing, or that there was no community of interest between the union members and the self-employers. However peaceful the means employed might have been and however intimate a community of interest might have existed, the Appellate Court still would have deemed the union's conduct unlawful. This is clearly preceptible from the case of the respondents Clementi, where there is not even the slightest factual basis in the record which could warrant any finding that the union engaged in threats or intimidation.

It is, therefore, evident that the Appellate Court decided the constitutional issue of freedom of speech in its relation to the organization of self-employers by unions.

II.

The Illinois Supreme Court by its refusal to recognize the fact that the Appellate Court decided a Constitutional issue, deprived the petitioners of due process of law.

Although the Illinois Appellate Court passed upon the constitutional issue of freedom of speech and based its opinion upon an alleged distinction between employees and self-employers, the Illinois Supreme Court refused to take cognizance of the determination of that issue by the Appellate Court. After the decision of the Appellate Court, with its ruling on the constitutional issue, the petitioners filed a motion with the Illinois Supreme Court to have the case transferred to it, and later a writ of error based upon the ground that the Appellate Court had decided a consti-

tutional issue which it had no jurisdiction to decide and which alone the Supreme Court could hear and determine. The Supreme Court denied both motion and writ of error. It acknowledges that when an Appellate Court passes upon a constitutional question by injecting it into the cause for the first time, the parties are entitled to urge objections, based on constitutional grounds, to the jurisdiction of that Court, at any time after the decision was rendered, since the parties could not anticipate the entry of a judgment in excess of the Court's jurisdiction. It, also, emphasized that such a judgment of the Appellate Court in excess of jurisdiction was *coram non judice* and ineffectual for any purpose but that it would assume and retain jurisdiction on review thereof.

Thus it took notice of the legal rule in theory; but it failed to apply it in practice. For, in refusing to grant the writ of error it denied that the Appellate Court had decided a constitutional question and declared that the decision was founded upon facts. It ignored the statement of the Appellate Court that the union's conduct as manifested in certain oral communications was unlawful, and that such a statement necessarily involved a determination of the question of freedom of speech. It ignored the fact that no conduct could be deemed unlawful if it was protected by the U. S. Constitution, and that the Appellate Court, in judging that conduct, expressly referred to the U. S. Constitution. It quoted the following statement of the Appellate Court with respect to the constitutional issue in its relation to self-employers:

> "The primary issue confronting this Appellate Court is whether the conduct of the defendant union in instructing its members not to make deliveries of gasoline to the plaintiffs, who are self-employers and hire no employees, on the sole ground that plaintiffs refuse to join the union, is unlawful and should be

> restrained by injunctive process and defendants be made to pay damages for the loss occasioned by their conduct."

Having thus recognized the constitutional issue as to self-employers, and having further recognized that it was the main basis—"the primary issue"—of the decision by the Appellate Court, the Supreme Court of Illinois denied that there was such an issue and stated that there was merely an issue of fact.

It, also, made the following statement in its opinion:

> "The Appellate Court specifically states that there is no common interest and *that the Union's conduct could not be protected by freedom of speech.*" (Emphasis supplied.)

A clearer and more manifest recognition of the fact that the Appellate Court determined the constitutional issue of free speech could hardly be imagined, and the subsequent denial of that fact is not quite understandable and militates against the principle that "it is of prime importance that no constitutional freedom, least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 85 L. ed. 836, 61 S. Ct. 552, 132 A. L. R. 1200.

Considering the statements made by the Illinois Supreme Court in its opinion, it recognized all elements of a constitutional issue in the opinion of the Appellate Court, but it refused to consider such elements as Constituting a constitutional issue. Yet, this refusal to recognize it in form, led to the denial of the motion for transfer and of the writ of error, which denials in turn deprived the petitioners of due process of law in violation of the Fourteenth Amendment to the U. S. Constitution by not affording them any opportunity to be heard on the constitutional issue, determinative in this case.

As soon as the Appellate Court rendered its opinion, the petitioners filed a petition for rehearing. The Appellate Court denied this petition and when the petitioners attempted to obtain a trial before the Supreme Court in order to have their case heard before that court, which alone had jurisdiction, they were met with the same refusal. Thus, the petitioners were deprived of any opportunity, not only to plead their case, but also to plead it before a competent court. If the Appellate Court's opinion would be allowed to stand without any possibility to have it reversed, it would mean that a state court, having no jurisdiction, could be the final arbiter in the state in the construction and interpretation of the United States Constitution and could determine such constitutional questions without affording the parties involved any opportunity to present argument and evidence to prove their side of the case. That is denial of due process of law.

The requirement of the Illinois practice that constitutional questions should be taken directly from the trial court to the Illinois Supreme Court, and that, if review is first sought in the Appellate Court, all constitutional issues, whether state or federal, are deemed to be waived, imposes no limitation upon the petitioners for certiorari in this case. Such waiver pertains only to the appellants and not to the appellees. "The principle of waiver of issues which might have been heard by the Supreme Court does not apply to the appellee. . . . " O. L. McCaskill: Illinois Civil Practice Act Annotated, The Foundation Press, Inc., Chicago 1933, p. 319, citing *Kowalczyk* v. *Swift & Co.*, 317 Ill. 312. See also *The People* v. *Richardson,* 397 Ill. 84 (1947). It should also be noted that the recent decision of this Court in *Parker* v. *People of State of Illinois,* 68 S. Ct. 708, 92 L. ed. 685, finds no application to the petition in this case, since it was the *appellant* in these proceedings

who took the case to the Appellate Court and not to the Illinois Supreme Court and thereby was deemed to have waived the constitutional issues.

This Court should grant the remedy prayed for by petitioners because "the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis." *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282, 76 L ed. 1102, 52 S. Ct. 556.

III.

The Union is protected by the constitutional right of freedom of speech in its effort to organize respondents.

The right of a union to win new members and so to strengthen the influence of its organization, is protected by the right of freedom of speech as guaranteed by the United States Constitution, and is not impaired by the fact that the prospective member sought to be enrolled is a self-employer. The right of freedom of speech extends to every person alike and its lawfulness might depend upon the contents of a statement made or the mode in which it has been made, but never upon the economic, occupational or social status of the person to whom a statement is directed. Employees, therefore, have a right to induce other persons, whether self-employers or not, to join their organizations. To restrict the peaceful exercise of such right would be, as indicated above, in violation of the Federal Constitution.

This Court, which is the final arbiter in all questions of the Federal Constitution, has repeatedly declared that the organizing of self-employers is a proper labor objective and that unions are protected in the exercise of that right from any infringement by legislative or judicial action of a state. See *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 57 Sup. Ct. 857, 81 L. ed. 1229 (1937); *Bakery & P. Drivers & Helpers, I. B. T.* v. *Wohl,* 315 U. S. 769, 62 Sup. Ct. 816, 86 L. ed. 1178 (1942); and *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293, 64 Sup. Ct. 126, 88 L. ed. 58 (1943).

In the *Wohl* case the New York Courts attempted to do exactly the same thing that the Appellate Court attempted to do in this case, namely to prevent the organization of self-employers, and to hold such a labor objective illegal. Yet, this Court declared that a state court lacked the authority to do so, since such an action would be in violation of the Fourteenth Amendment to the U. S. Constitution.

Employees have a right to organize and to enlarge their union's or organization's membership by all lawful means. If they proceed in that way, they act lawfully and not maliciously.

Chief Justice Taft said in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209, 42 S. Ct. 72, 66 L. ed. 189 (1921):

> "To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious."

Thus, this Court recognized that it was a legitimate objective of unions to organize all those who compete by their labor with union men or work in the same trade or industry in the same locality.

The respondents were the direct competitors of many members of the union, whose membership consisted of truckdrivers, filling station employees and small filling station operators. Petitioners and respondents were also engaged in the same industry. This would have been true, even if the membership of the petitioning union had consisted of truck-drivers only, since truck-drivers belong to the same industry as filling station operators. Trucks cannot be driven without gasoline and filling stations cannot exist without automobiles. There is a vital interdependence between these two, which amalgamates them into a unit.

As emphasized in the trial court's opinion, many small filling station operators were members of the union, and as demonstrated by Plaintiffs' Exhibit No. 7 (Rec. 45), which is the union's form of agreement with service station operators, many filling station employees were also members of the union and represented by it in their collective bargaining agreements with employers.

Severe inroads upon the working conditions of these union filling station employees and filling station operators were threatened to be made by the respondents. They kept their stations open at all hours of the day and night; they tried to compete unfairly with other stations by the payment of sales premiums, and they did not conform to other working conditions prevailing in unionized stations, all practices which, if allowed to continue, could effectively undermine the working and employment standards of union men, working in union stations, by taking more and more business away from them. The petitioning union, therefore, had a vital interest in organizing the respondents, and the

first thing which the union men did when they tried to persuade the respondents to join the union, was to proffer them an agreement by which the respondents were to obligate themselves to conform to union standards, especially with respect to closing hours and the giving up of sales premiums. (Rec. 45).

Since the working conditions of the respondents vitally affect the standards of the union members, it is immaterial whether the respondents were self-employers or not. However, the respondents were self-employers in name only, merely in the sense that they worked without the help of any paid employees. In reality, they were under the complete dependence and control of the gasoline supplying companies. This was especially true of the respondents Dinoffria; the ground on which they lived and worked was owned by the company; the premises on which they conducted their business belonged to the company; the products sold were those of the company, and could be only those of the company. (See for similar situations: *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 85 L. ed. 63; and *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851.) Under these conditions, it is obvious that they were not self-employers but employees and that the artificial line of demarkation between the organization of self-employers and employees which the Illinois Appellate Court attempted to draw, was not even in this respect applicable.

Conclusions.

The Illinois Appellate Court, without having jurisdiction, passed upon the constitutional issue of freedom of speech in its relation to the attempted organization of respondents by unions. It decided this question adversely to petitioners, in contravention to established principles laid down by this Court in the *Senn, Wohl* and *Angelos* cases.

The Illinois Supreme Court refused to hear the case upon motion to transfer or upon writ of error; it thereby denied petitioners any opportunity to have the case determined by a court of competent jurisdiction.

Thus, the petitioners were deprived of their constitutionally guaranteed rights in a twofold manner: first, by the refusal of the State Supreme Court to hear their case, which refusal vested in the Illinois Appellate Court—a court having no jurisdiction—the final authority in the State to determine federal constitutional questions; and second, by the decision of the Appellate Court which denied to petitioners the right of freedom of speech. Both of these actions of the State courts were in violation of the Fourteenth Amendment to the U. S. Constitution.

Respectfully submitted,

DANIEL D. CARMELL,
WALTER F. DODD,
Attorneys for Petitioners.

FRED HERZOG,
FRANCIS A. DUNN,
Of Counsel.